The Winchell Company *and* Graphic Communications International Union, Local 14-M, AFL–CIO–CLC. Case 4–CA–19986

December 23, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 16, 1991, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 4–RC–17069. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On November 1, 1991, the General Counsel filed a Motion for Summary Judgment. On November 6, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent and Charging Party filed responses.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding and asserts that substantial turnover in the unit since the election has rendered the unit inappropriate.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence,[1] nor does it allege any special circumstances[2] that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, The Winchell Company, a Pennsylvania corporation, is engaged in the business of providing graphic arts services to commercial and financial customers with a facility in Philadelphia, Pennsylvania. During the year ending September 16, 1991, the Respondent, in the course and conduct of its business operations described above, purchased and received goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held May 3, 1990, the Union was certified on July 19, 1991, as the collective-bargaining representative of the employees in the following appropriate unit:

[1] The Respondent, in its opposition to General Counsel's motion (although not in its answer to the complaint), contends that ''newly discovered and previously unavailable evidence,'' to wit, evidence concerning changes occurring at the Respondent's place of business since the Employer's April 12, 1990 request for review of the Regional Director's decision, warrant a hearing on the unfair labor practice complaint or a reopening of the representation case. ''Newly discovered evidence is evidence that was in existence at the time of the hearing, and of which the movant was excusably ignorant.'' *Seder Foods Corp.*, 286 NLRB 215, 216 (1987). The evidence now proffered by the Respondent is not newly discovered. To the extent that the Respondent is now moving to reopen the record in the representation case, it is denied.

[2] The Respondent also contends there are special circumstances, to wit, substantial employee turnover since the Board's denial of the Respondent's motion for reconsideration of the Board's decision in the underlying representation case. The Respondent relies on *Jefferson County Community Center v. NLRB*, 732 F.2d 122 (10th Cir. 1984), in which the 10th Circuit found that the Board did not abuse its discretion in 259 NLRB 186 (1981), by allowing professional employees to vote in a rerun election whether they wished to be included in a unit with nonprofessional employees (as well as allowing the professionals and nonprofessionals to vote separately whether they desired union representation, pursuant to Sec. 9(b)(1) of the Act) after the election had been set aside on the basis of a fraudulently cast ballot. Although the court volunteered that it was not unreasonable for the Board to conduct a new vote on the inclusion, considering the 6-month time lag between elections, to take into account the turnover among professional employees, the Board, in 259 NLRB 186 (1981), did not rely on turnover. Furthermore, the 10th Circuit's opinion does not require the Board to consider employee turnover. In addition, the election conducted in the case at hand is a valid election and has not been overturned.

The Board, on June 28, 1991, denied as lacking in merit the Respondent's June 14, 1991 motion for reconsideration or, in the alternative, a new election, on the basis of turnover. We would not find special circumstances here even if, as the Respondent contends, only 49 of the original 132 eligible voters remain employed by the Respondent and the number of unit employees is now 59.

INCLUDED: All full-time and regular part-time lithographic production employees employed by the Employer.

EXCLUDED: Bindery department employees; production coordinators; proofreaders and computer operators in the photo composition department; letterpress department employees; proofreaders, quality control employees and litho maintenance employees in the offset prep department; line-up employees and cutters in the sheetfed offset press department and the multilith offset press department; guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since July 22, 1991, the Union has requested the Respondent to bargain and since August 7, 1991, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after August 7, 1991, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, The Winchell Company, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Graphic Communications Internationl Union, Local 14-M, AFL–CIO–CLC, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDED: All full-time and regular part-time lithographic production employees employed by the Employer.

EXCLUDED: Bindery department employees; production coordinators; proofreaders and computer operators in the photo composition department; letterpress department employees; proofreaders, quality control employees and litho maintenance employees in the offset prep department; line-up employees and cutters in the sheetfed offset press department and the multilith offset press department; guards and supervisors as defined in the Act.

(b) Post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Graphic Communications International Union, Local 14-M, AFL–CIO–CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

INCLUDED: All full-time and regular part-time lithographic production employees employed by the Employer.

EXCLUDED: Bindery department employees; production coordinators; proofreaders and computer operators in the photo composition department; letterpress department employees; proofreaders, quality control employees and litho maintenance employees in the offset prep department; line-up employees and cutters in the sheetfed offset press department and the multilith offset press department; guards and supervisors as defined in the Act.

THE WINCHELL COMPANY